

### The creation of a common EU energy market: a quiet revolution with far-reaching consequences

Ispolinov, Alexei; Dvenadtcatova, Tatiana

Veröffentlichungsversion / Published Version  
Zeitschriftenartikel / journal article

#### Empfohlene Zitierung / Suggested Citation:

Ispolinov, A., & Dvenadtcatova, T. (2013). The creation of a common EU energy market: a quiet revolution with far-reaching consequences. *Baltic Region*, 2, 78-91. <https://doi.org/10.5922/2079-8555-2013-2-8>

#### Nutzungsbedingungen:

Dieser Text wird unter einer Free Digital Peer Publishing Licence zur Verfügung gestellt. Nähere Auskünfte zu den DiPP-Lizenzen finden Sie hier:  
<http://www.dipp.nrw.de/lizenzen/dppl/service/dppl/>

#### Terms of use:

This document is made available under a Free Digital Peer Publishing Licence. For more Information see:  
<http://www.dipp.nrw.de/lizenzen/dppl/service/dppl/>

# THE CREATION OF A COMMON EU ENERGY MARKET: A QUIET REVOLUTION WITH FAR-REACHING CONSEQUENCES

A. Ispolinov

T. Dvenadtsatova\*



*The article explores important changes in the EU energy structure and legislation. The authors examine the main stages of the creation of a common energy market in the EU. They analyse recent actions taken by the European Commission and the Court of Justice of the EU against its member states and energy monopolists who directly or indirectly breach the rules of competition in the energy sector. The authors come to the conclusion that liberalization of the European energy sector will eventually have serious theoretical and practical consequences for the EU, as well as third countries, including Russia.*

**Key words:** common energy market, CJEU, European Commission, 3<sup>rd</sup> Internal Energy Market Legislative Package (3<sup>rd</sup> Energy Package), competition, liberalization, EU law

## Introduction

More than the 60-year long history of the European Union, which is going through a difficult period now, reveals a number of features that are characteristic of a major player in international politics. First of all, it is the EU's exceptional resilience, despite different crises and numerous predictions of its pending demise. Secondly, it is the striking ability of the EU to find ways out of seemingly hopeless situations, the ability which has been proven on many different occasions. Thirdly, a distinctive feature of the current EU policy is patience and flexibility in choosing means to achieve its goals accompanied by the EU's determination and persistence in implementing its plans. As a result of this policy, whole branches of economy, which were earlier bastions of national sovereignty, undergo drastic changes over short periods of time to the surprise of the whole world. It is this transforma-

---

\* Lomonosov Moscow State University  
The 1st building of the faculties  
of humanities, Leninskie Gory, Moscow,  
119991, Russia

*Submitted on January 29, 2012*

doi: 10.5922/2079-8555-2013-2-8

© Ispolinov A., Dvenadtsatova T., 2013

tion that the EU energy market has been undergoing during the last 15 years. The course and results of this transformation already force many states not only to reconsider their energy policy in general and towards the EU in particular, but also to adopt the EU practices when solving domestic problems.

This article analyses the legal foundation of the creation of a common energy market in the European Union and gives a short description of the three stages of its elaboration. Special attention is paid to the means of enforcement of energy obligations for the EU member states and companies by the European Commission and the EU Court of Justice. We believe that a scrupulous study of the EU experience will make it possible for Russian companies and the Russian Federation to better understand the logic and objectives of the EU in the problematic EU-Russia energy dialogue. The achievements of the EU in regulating the energy market are indicative of the need to reconsider the attitude of both the state and society to national natural monopolies, as well as legal provisions regulating their work.

### **Prerequisites and first steps towards a common energy market**

Historically, the supply of energy, heat, and gas to consumers was viewed in Europe as an obligation of the state, somewhat of a public service, which determined the predominant character of the energy sector within the European economy. Almost all European countries established companies which were vertically integrated and often publicly owned. These companies were granted the monopoly right to production, transmission and supply of electricity, heat, and gas to consumers. In return they had to take on the obligation to ensure continuous supply (often at different prices for different population groups).

Researchers identify several reasons why this path of the energy sector development was selected by national governments [3, p. 1]:

1) there used to be a popular belief that, due to its large size, the energy sector can only be an object of natural monopoly; all exclusive rights belong to energy organisations controlled by the state;

2) the monopolist — when being granted these exclusive rights — simultaneously assumed obligations to provide services of general economic interests<sup>1</sup>, i.e. there was somewhat of an agreement between the government and monopolists, who had to provide continuous energy supply to consumers across the country;

3) the governments believed that having only one energy provider makes it easier to control both its work and energy prices;

4) moreover, a mere idea of competition in the energy sphere was perceived as sedition fraught with political risks, because of possible dissatisfaction of consumers with unpredictable supply-demand fluctuations, or even energy and heat supply crises in case market relations were allowed in this sector.

---

<sup>1</sup> For more information on the concept of “services of general economic interests” in the EU law see *The Communications* of the Commission on services of general interest, COM (2000) 580 final, Brussels 20.9.2000. URL: [http://socialpolicy.ucc.ie/com2000\\_0580en01\\_Communication%20on%20General%20Interests-revised.pdf](http://socialpolicy.ucc.ie/com2000_0580en01_Communication%20on%20General%20Interests-revised.pdf) (accessed 15 December 2012).

However, since the late 1970s, the existent monopoly model has been questioned by economists, legal scholars, politicians, and industrial and consumer organisations. Economists and lawyers believe that the energy sector is potentially competitive, thus monopoly can be replaced with competition.

At the same time, consumer organisations started to pay increased attention to low efficiency (productivity) of state monopolies. Lack of competition and, as a result, lack of alternatives for consumers could hardly increase energy monopolists' interest in consumers and in the improvement of the quality of services provided. Energy supply to different consumer groups at different prices (sometimes established by a directive) resulted in cross-subsidisation within the monopoly, when extremely high rates for certain consumers made it possible to offer other consumers certain discount rates totally unrelated to the cost of energy. All these were a great burden, first of all, for industrial consumers from other branches of the economy, where competition was rather tough. Non-transparent and unpredictable energy charges imposed by natural monopolies made it difficult for these companies to compete with US and Japanese producers. Thus, large businesses also started to support the idea of reforming the energy sector. Moreover, the positive experience of energy market liberalisation in the USA in the 1970s and the UK in the early 1980s convinced continental Europe that liberalisation can give positive economic results. The new market model based on competition also became an interesting alternative for the development of European energy market.

The understanding that the European Union needed a common internal energy market developed a long time ago — in the late 1980s. Back then, it was already clear what characteristics the European energy market should have: it should be competitive, common, and flexible (i.e. capable of rapid adaptation to changes). This was reflected in numerous working documents and the EU legislation<sup>2</sup>. However, the turning point was a change in the approach to energy supply to the consumer. The traditional interpretation of energy supply as an obligation of the state, crucial for the normal functioning of any society, was replaced by a perception of energy as a commodity, although an idiosyncratic one. And being a commodity, it is subject to the laws of competition.

The European Commission started to promote the idea of a common, open and competitive energy market in the EU. The EC had to admit that energy monopolists did not let energy companies from other member states into their national market. It resulted in the fragmentation of the market and disruption of the basic principles of the functioning of the common EU market. As early as the 1990s, the European Commission announced its intention to include the traditionally monopolised energy markets (electricity and gas) dominated by national monopolies into the European market programme. At the same time, the unfolding energy market liberalisation rested

---

<sup>2</sup> See, for example, *Communication* from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions. Making the internal energy market work. Brussels, 15.11.2012, COM (2012) 663 final, P. 2. URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0663:FIN:EN:PDF> (accessed 17 January 2013).

on the assumption that it had to be implemented simultaneously throughout the European Union.

However, the European Commission had to take into account the seriousness of the problem. Firstly, national energy markets were fragmented not only legally, but also technologically (due to different technical standards), and infrastructurally (due to the absence of the necessary infrastructure for transmitting energy from one state to another). Another problem was vertically integrated natural monopolies.

Following the UK and US achievements in the energy sector, these energy companies gradually realized the possibility and necessity of competition in energy production (electricity generation and energy resources extraction) and energy supply to end consumers.

At the same time, in energy transmission from producers to consumers, one can hardly expect any competition, for it is hardly rational to construct several parallel transmission lines or pipelines. Thus, a decision was made to retain monopoly on energy transmission networks and separate transmission from extraction, generation and supply to end consumers. So, the main tasks were the splitting of national monopolist companies and the formulation of clear rules ensuring an equal and non-discriminating access to energy transmission networks for all producers and all companies involved in retail energy trade. It had to be done despite scepticism and even resistance of certain states, where the energy sector was traditionally monopolised by state companies [2, p. 432—433].

Anyway, the process of energy market liberalisation was launched in the European Union. It took place in the form of step-by-step adoption of legislative instruments, because the opening of national markets had to be gradual in order to solve technological problems as well as legal and political issues.

*Stage one.* The process of liberalisation of the EU energy market commenced with the adoption of Directive 96/92/EC (the first energy directive<sup>3</sup>), which had to be implemented by the member states in two years.

At the first stage of liberalisation, the EU economy and society already showed prerequisites for widespread competition in the energy sector. Given the introduced liberalisation, the focus of attention was on the establishment of basic rules of competition among energy producers and suppliers and the formulation of their fundamental rights. According to the Commission's proposals, competition limitations are admissible in case their application relates to the fulfilment of public obligations of certain companies. The first liberalisation stage was carried out under the motto "as much competition as possible, as much regulation as necessary" [6, p. 4]. The partial opening of markets manifested itself in the freedom of the states to choose which markets are to be open for competition and when. The only obligatory criterion was the requirement that the open market accounted for at least 35 % of the annual power consumption by end consumers. This target was to be achieved in five years, i. e. by 2003 [2, p. 426].

---

<sup>3</sup> See *Directive 96/92/EC* of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity // *Official Journal of the European Communities (OJ)* №L27/20, 30.01.1997.

Another important element of the first energy directive is that it launched the process of separating electric energy generation and sales by national monopolies from electricity transmission. Some states were reluctant to accept it. It resulted in the introduction of separate bookkeeping for these operations within vertically integrated companies and the splitting of these businesses at the level of management (not yet at the level of ownership). However, the foundation was laid.

The results of the first energy directive were not dramatic, but, nevertheless, significant: it ensured lower prices and better service standards. However, the shortcomings were also evident.

Since the first directive regulated only the basic principles of a common EU energy market, the member states enjoyed significant freedom in shaping their national energy legislation. This approach led to the inconsistent and uncoordinated implementation of the Directive provisions by the member states. As a result, national markets remained defragmented, which hampered the development of competition. After the first energy direction came into force in 1996, the Commission realised the need to prevent the development of several parallel (national) energy markets.

Directive 98/30/EC (the first gas directive<sup>4</sup>) was adopted in June 1998; the document came into force on August 8, 1998. The deadline set by the directive for the harmonisation of the national legislation was August 2000. The first gas directive contained general rules regulating transmission and storage of natural gas, its distribution and consumption. It also addressed the organisation and functioning of the gas market, as well as providing access to it. However, all these steps were still insufficient for reaching the set goals. The main problems were related to ensuring open access to gas pipelines and gas storage. Among other key issues were the regulation of tariffs and the degree of market openness among the EU member states.

However, the adoption of the two directives was the first serious step towards liberalisation.

*Stage two.* In November 2002, the Second Energy Package<sup>5</sup> was adopted. The provisions of the document were mainly aimed at ensuring equal access to energy networks and at developing a competitive environment. All in all, the Second Energy Package contained a large number of provisions related to the liberalisation of the energy sector — the rules of further division of business activities of natural monopolies, the reduction of their horizontal concentration, the development of competition in wholesale and retail energy supply, the monitoring of energy transmission and distribution networks, and the management of third party's access to the energy infrastructure. As to unbundling,

---

<sup>4</sup> See *Directive 98/30/EC* of the European Parliament and of the Council of June 22, 1998, concerning common rules for the internal in natural gas // Official Journal of the European Communities (OJ), No: L204/1, 21/7/1998.

<sup>5</sup> *Directive 2003/54/EC* of the European Parliament and of the Council of June 26, 2003, concerning common rules for the internal market in electricity which was published in (2003) O.J. L. 176/37, *Directive 2003/55/EC* of the European Parliament and of the Council of June 26, 2003, concerning common rules for the internal market in natural gas which was published in (2003) O.J. L. 176/57.

there were two minimum requirements at this stage: the legal splitting of energy transmission companies from the ones supplying energy to end consumers and the establishment of a national regulatory authority in each state.

The Second Energy Package set tighter deadlines for reforms to be completed — July 1, 2007 for wholesale energy markets and July 1, 2004 for retail markets.

In 2005, the Commission carried out a comprehensive study of the functioning of the common European energy market. The Commission identified the following main problems:

- persistently excessive monopolisation in the energy sectors of most EU member states;
- lack of liquidity in the markets, which could have ensured a continuous inflow of new incumbents and energy transmission from the territory of one state to another;
- weak integration between energy markets of the member states;
- lack of transparency;
- inadequate unbundling of energy networks and supply.

However, these issues, as well as the achievements on the pathway towards the EU energy market liberalisation allowed the Commission and the member states to set more ambitious goals. At the European Council meeting held in March 2007, a programme best known as “20—20—20”<sup>6</sup> was adopted. The programme is aimed at reducing CO<sub>2</sub> emissions by 20 %, increasing the share of renewable sources as part of the overall EU energy mix to 20 %, and increasing energy efficiency by 20 %. All of these objectives are to be achieved by 2020.

*Stage 3.* In the framework of the “20—20—20” programme implementation, the Commission developed the Third Energy Package (TEP<sup>7</sup>), which came into force in June 2009. At the same time, the Commission submitted its proposal to establish the Agency for the Cooperation of Energy Regulators to the European Parliament and the European Council. It had to become

<sup>6</sup> See the Presidency Conclusions of March 8—9, 2007. URL: <http://register.consilium.europa.eu/pdf/en/07/st07/st07224-re01.en07.pdf> (accessed 18 December 2012).

<sup>7</sup> TEP consists of two directives and three regulations: Directive 2009/72/EC of the European Parliament and of the Council of July, 13, 2009, concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC // Official Journal of the European Union (OJ), No: L 211/55, 14/8/2009; Regulation (EC) No 714/2009 of the European Parliament and of the Council of July, 13, 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulations (EC) No 1228/2003 // Official Journal of the European Union (OJ), No: L 211/15, 14/8/2009; Directive 2009/73/EC of the European Parliament and of the Council of July, 13, 2009, concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC // Official Journal of the European Union (OJ), No: L 211/55, 14/8/2009; Regulation (EC) No 715/2009 of the European Parliament and of the Council of July, 13, 2009 on conditions for access to the natural gas transmission networks and repealing Regulations (EC) No 1775/2005 // Official Journal of the European Union (OJ), No: L 211/36, 14/8/2009; Regulation (EC) No 713/2009 of the European Parliament and of the Council of July, 13, 2009 establishing an Agency for the Cooperation of Energy Regulators // Official Journal of the European Union (OJ), No: L 211/1, 14/8/2009.

the first step towards having a common European body regulating of the EU energy market. Without such an organization, the proper functioning of the energy market would be questionable.

The TEP aims to further the liberalisation of the EU energy and gas markets and strengthen the interconnection between national markets in order to ensure energy market integration between the EU member states. To achieve these goals, the TEP contains a number of new provisions and initiatives:

- separation of energy supply and energy generation from energy network operation;
- greater independence of energy market regulating bodies;
- division of power, the development of cooperation and decision making by the National Regulating Agency for Transnational Issues;
- greater coordination between energy transmission companies for more efficient cross-border trade;
- increased transparency in energy market operations and consumer protection;
- equal access to gas storage facilities and LNG production and supply.

It should be emphasised that liberalisation of the EU energy sector in the framework of the TEP requires application of competition rules.

It is a necessary condition for the creation of a competitive energy market. Competition rules in the energy sector are directly related to the fundamental rules and categories of the EU competition law. First of all, they introduce stringent control over direct or indirect state aid, which can make competition in the common energy market senseless.

### **The current status of the EU energy market: problems and prospects**

Twenty years after the beginning of energy market liberalisation, which was initiated by the Commission, significant achievements have been made; they relate, first of all, to the adoption and implementation of the TEP provisions. At the same time, the legal status of the common EU market was strengthened by the Lisbon Treaty, which, for the first time in the history of the European Union, contained a separate article on energy issues (article 194 of the Treaty on the Functioning of the European Union<sup>8</sup>).

---

<sup>8</sup> Article 194 of the TFEU reads as follows: “In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.” For more detail see [1].



The TEP provisions were welcomed by those member states that had achieved significant results in liberalising their national energy markets (for example, the UK, the Netherlands, etc.). However, such EU member states as Germany and France<sup>9</sup> criticised the Commission's liberalisation initiatives, especially the requirements for the unbundling of national monopolies. Thus, the provisions of the Third Energy Package are still the subject of many heated discussions and arguments.

The success of TEP introduction largely depends on its opportune and correct implementation by all EU member states. Most TEP provisions were included into the national legislation of the EU member states and came into force as early as 2011. However, this area still remains most problem-ridden.

Firstly, there is still the problem of asymmetric implementation of the TEP provisions by the EU member states and, as a result, different degree of openness of energy markets of the member states. In general, it explains why some member states have achieved more in terms of opening their markets for competition than others.

Secondly, there are issues that are to be resolved in order to achieve the set targets by 2020. They include the absence of an all-European controlling and regulatory body. A matter of particular concern is the fact that national authorities are still unable to solve transboundary problems in the energy sector.

Another problem is the non-competitive behaviour of former monopolists. The point is that the opening of the energy market for competition does not mean that the market will immediately become competitive. In effect, even in the framework of the on-going liberalisation, former monopolists still hold strong positions in the market. This situation may continue for a rather long time. At the same time, former monopolists often take advantage of their position to prevent the appearance of new incumbents in the market. They create obstacles to prevent competitors from accessing network infrastructure, take advantage of the pricing policy, engage in uncompetitive cross-subsidisation, etc. European directives usually contain certain regulation methods to prevent such misconduct. However, the current situation requires interference of the Commission, national authorities and judicial bodies, which are to exert control over the states and companies to ensure the fulfilment of their obligations.

Finally, there is another complication related to the so called "economic patriotism", which is still professed by a number of the EU states. According to this concept, economy regulation is usually considered an issue of national policy. Moreover, network infrastructure is understood as the infrastructure meant exclusively for internal, rather than European use. The lack of cross-border infrastructure, common for the whole Europe, is an objective obstacle on the path towards free transmission of different types of energy across the borders of the EU member states.

---

<sup>9</sup> Both France and Germany still believe that the consolidation of different activities in the field of energy in the framework of one company (the so called "national leader"), which can be controlled by the state at any time, is always better, also because of the strategic, economic, and political significance of these activities for the country.

In Russia, the Third Energy Package is largely known for its Third Country Clause<sup>10</sup>, which suggests the introduction of a special procedure for transmission system operators, provided these operators or transmission networks were purchased or controlled by third country companies. A company can be refused certification, in case the purchaser has not met the unbundling requirement. The following arguments were put forward to justify the need for the Third Country Clause:

— firstly, the EU was concerned about the fact that the success of the idea of unbundling can be undermined by the actions of third country companies, which are not subject to the provisions on unbundling and continue to work in both energy production, sales and energy network operation. Thus, in European companies, the requirement for unbundling may, theoretically speaking, result in the purchase of European networks by foreign energy giants. It made the Commission take measures against “non-European” companies operating in the EU.

— secondly, it is lack of reciprocity in opening energy markets. It means that, while the European energy market was open for foreign investors, including energy producing companies, the markets of most energy exporting countries were closed for Europe<sup>11</sup>.

Despite the fact that the provisions and requirements of the Third Energy package are still the subjects of heated discussions and problems related to their implementation and application are still arising, some positive results have already been achieved.

Firstly, energy production and sales have been separated from energy transmission infrastructure (transmission lines and pipelines). The activity, which was controlled earlier by a single national operator, is now performed by a wide range of companies operating not only in the territory of a single state, but also across the European Union.

Secondly, important steps have been made to eliminate barriers and unite national markets both legally and technologically.

Thirdly, the consumer is playing an increasingly active role having been granted more rights and opportunities when choosing the energy supplier. Almost 14 European energy and gas companies operate in more than one EU states. In 20 EU member states, there are more than three major electricity suppliers. It allows consumers (including households) to choose among several suppliers or change the supplier, since there is an opportunity to choose from several options. At the same time, it is expected that the process of changing suppliers will accelerate in the EU member states. According to the current estimates, EU consumers can already save up to 13 billion euros per year if they change suppliers on the basis of the lowest price considerations<sup>12</sup>.

<sup>10</sup> See Directive 2009/72 Art. 11; Directive 2009/73 Art. 11.

<sup>11</sup> See Impact Assessment on the TEP P.28. URL: [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/cia\\_2009\\_en.htm#tren\\_ecfin\\_rtd](http://ec.europa.eu/governance/impact/ia_carried_out/cia_2009_en.htm#tren_ecfin_rtd) (accessed 18 January 2013).

<sup>12</sup> See The functioning of retail electricity markets for consumers in the European Union, Study on behalf of the European Commission, DG SANCO, 2010. URL: [http://ec.europa.eu/consumers/consumer\\_research/market\\_studies/docs/retail\\_electricity\\_full\\_study\\_en.pdf](http://ec.europa.eu/consumers/consumer_research/market_studies/docs/retail_electricity_full_study_en.pdf) (accessed 18 January 2013).

Fourthly, the measures for supporting consumers are supplemented by the introduction of new energy saving technologies. Calculations show that expenses of domestic consumers can be reduced by up to 13 % and even more if energy saving technologies are used [5, p. 2—6].

Fifthly, the EU succeeded in ensuring stable energy supply, which is the weakest point for the Union as an importer of energy resources. An increase in the “liquidity” of wholesale markets within the EU contributed to greater security of energy within the EU. Using their system of gas storage, the EU member states can help each other by redistributing energy within the European Union. Moreover, the number of countries supplying gas to Europe increased from 14 to 23<sup>13</sup> in 2000—2014.

Taking into account the accumulated positive experience, heads of European states and governments set a strict deadline (until the end of 2014) to complete the creation of a common EU energy market. Within this period, the states have to implement the existing EU energy legislation and start implementing it in practice, including the observation of the major technologic rules adopted in the European Union.

### **The role of the European Commission and the EU Court in creating the common energy market in the EU**

The achievement of the set goals will depend on the determination and, perhaps, even strictness of the EU when it comes to the issue of states and companies fulfilling their obligations and following the rules of competition. At the moment, the European Commission is investigating as a matter of priority the cases against those member states that have not taken into account the provisions of the Third Energy Package in their legislation or have done it inadequately. Since September 2011, the Commission examined 19 cases relating to the inopportune implementation of the provisions of Directive 2009/72/EC and the same number of cases relating to Directive 2009/73/EC<sup>14</sup>). Only 12 of these cases were closed by October 2012. As to the others, the investigation procedure still continues. The Commission aims to ensure strict monitoring of the implementation of the adopted

<sup>13</sup> The impact of liberalisation in supply security can be shown through what happened in the beginning of February 2012, when a reduction in gas imports coincided with an extremely cold winter and unprecedentedly high demand for gas and electricity. Short-term price signals within different gas network nodes, as well as power exchange in the western part of the EU made it possible to supply gas to the areas where it was needed most and ensure that all existing capacities were put online to secure continuous energy supply to the end user. For more detail see: *Communication* from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions. Making the internal energy market work. Brussels, 15.11.2012, COM (2012) 663 final P. 5. URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0663:FIN:EN:PDF> (accessed 18 January 2013).

<sup>14</sup> See Table 12 in Staff Working Document entitled Energy Markets in the European Union in 2011 / «SWD 1» part 4.

legislation in the EU common energy market and the markets of its member states.

According to the European Commission, creating equal opportunities for all market incumbents to use power transmission lines is of major importance. Otherwise the development of fair competition is impeded [7]. In this connection, the European Commission carried out several investigations against some energy companies operating in the European Union on the grounds of their breaking the EU competition rules.

A vivid example is the Commission's investigation into the anti-competition agreement between E. ON and GDF relating to the supply of natural gas transmitted along the MEGAL pipeline<sup>15</sup>, which was used as a channel to transport gas from Russia to France. During the investigation, on July 8, 2008, the Commission imposed the first fine for an antitrust offence in the energy sector. It did not only levy a fine of 553 mln euros, but also imposed legal obligations on E. ON, which was to facilitate easier access to the German gas market. It was done as a response to E. ON misuse of its dominating position, namely limiting access to the market, which was a direct infringement of competition rules<sup>16</sup>.

In another case, the Commission addressed the problems related to the vertical integration of market operators. The investigation was conducted against RWE — a German electric utility company based in Essen, which raised prices in comparison with other competitors in May 2007. It complicated the access to the German energy market and to the German gas transmission network<sup>17</sup>.

The Commission also initiated an investigation against ENI Sp. A. (an Italian oil and gas company) for attempting to force potential competitors out of the Italian energy sales market. As a result, ENI relinquished its shares in companies that own, exploit, or manage transmission infrastructure (gas pipelines, in this case) transporting gas to north Italy from Russia and Northern Europe. The Commission imposed legal obligations on ENI and closed the case<sup>18</sup>.

The Commission holds a strict position when it comes to the policy of some EU member states aimed at supporting their national energy giants. So,

---

<sup>15</sup> MEGAL is a pipeline, which was owned by E. ON and GDF (E. ON is a German energy and gas company, GDF is a French company, which produces, transmits, and sells natural gas throughout the world).

<sup>16</sup> See E. ON/GDF (Case COMP/39.401) Summary of Commission Decision of 8 July 2009. URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:248:0005:0006:EN:PDF> (accessed 11 November 2011); Rod Lambert & Christopher Reekie (2010).

<sup>17</sup> See RWE gas foreclosure (Case COMP/39402) Commission Decision of 18 March 2009 URL: [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39402/39402\\_576\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf) (accessed 11 November 2011); Rod Lambert & Christopher Reekie (2010).

<sup>18</sup> ENI foreclosure (Case COMP 39.315) Commission Decision of 29 September 2010. URL: [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39315/39315\\_3019\\_9pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39315/39315_3019_9pdf) (accessed on 11.11.2011); Rod Lambert & Christopher Reekie (2010).

for example, the Commission imposed strict conditions when giving permission to the merger of two French companies — GDF and Suez in 2006.<sup>19</sup>

Another example is the investigation launched by the Commission in September 2012 against Gazprom, which was suspected of misusing its dominating position in a number of national EU markets<sup>20</sup>.

The Commission also makes sure that state interference into gas and electricity prices is gradually eliminated. Many member states have already managed to abandon state regulation of gas and electricity pricing, including retail consumption. The Commission also reached an agreement with a number of states (Romania, Greece, and Portugal) on the gradual abandonment of state interference in energy resource pricing. However, most EU member states still try to regulate prices in their retail energy market. The Commission have already launched several investigations against the member states setting prices for consumers and whole manufacturing industries.

In this connection, a vivid example is the decision of the Court of Justice of the EU in the *Federutility* case, which became a precedent. In its preliminary ruling requested by an Italian court, it stated that electricity price regulation can be justified only in certain strictly limited cases<sup>21</sup>. The parties to dispute were producers and producer alliances operating in the Italian gas market (*Federutility*, *Assogas*, etc.) and AEEG — the body that established the so called “reference price” for gas upon the request of the Italian government. This price had to be used by gas producers and suppliers as a benchmark when formulating proposals for some of their clients. The claimant demanded the abolition of the most recent pricing decision of the defendant, since the time frame of this decision stretched far beyond July 1, 2007 — the deadline, after which, according to Directive 2003/55 (article 23 (1) (c)), the natural gas selling prices should be determined solely by the supply-demand correlation.

## Conclusion

The experience in the creation of a common EU energy market makes it possible to draw several general economic and legal regulation-related conclusions.

Firstly, it is important that the EU is ready to consider the problem from a different perspective, to believe in market regulation methods against the background of strict competition rules enforced by the EU authorities. Spe-

<sup>19</sup> For more detail see Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions. Making the internal energy market work. Brussels, 15.11.2012, COM (2012) 663 final P. 9—14. URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0663:FIN:EN:PDF> (accessed 11 November 2011).

<sup>20</sup> See the European Commission Press Release of 04 September, 2012. URL: [http://europa.eu/rapid/press-release\\_IP-12-937\\_en.htm](http://europa.eu/rapid/press-release_IP-12-937_en.htm) (accessed 15 January 2013).

<sup>21</sup> See Case №C-265/08 *Federutility and others v Autorita per l'energia elettrica e il gas*. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-265/08> (accessed 15 January 2013).

cial significance is ascribed to the ability of both the state and the society to abandon the idea that electricity, gas, and heat supply is an obligation of the state, a public service and view energy as a commodity, although, perhaps, an idiosyncratic one. In other words, the EU experience questions the very existence of natural monopolies in the energy market.

Secondly, the liberalisation of the energy market in the form of its demopolisation brings to the fore the splitting of energy generation and sales where competition is welcome, from energy transmission. Transmission companies, by definition, cannot be many in number and have to be involved only in energy transmission. A special role should be (and is) played by the EU regulatory authority, which is meant to control the common energy market and ensure equal access to transmission networks both for producers and sellers.

Thirdly, it is important not only to formulate and strictly observe the EU completion rules, but also to provide continuous and secure electricity and gas supply to consumers. Here, emphasis is placed on decisive measures to be taken by the EU institutions, first of all, the European Commission and the Court of Justice, which have to act without any regard to individuals or the closeness of companies, offending the new legislation, to authorities of the member states.

Fourthly, as demonstrated above, the Third Energy Package, much-criticised in Russia, has its own logic, which is quite hard to defy. First of all, one must understand and accept its focus on competition, rejecting any unilateral concessions. This will inevitably be perceived as a discriminating exception, undermining competition, distorting the market and thus being inadmissible for the European Union. Russia must understand this logic, if its national energy companies want to at least preserve their standing in the already gigantic common energy market of the EU.

Finally, it is interesting to follow the adjustment of the EU energy market liberalisation experience to Russian conditions, particularly regarding natural monopolies. If Russia seriously considers increasing the competitiveness of its economy and abandonment of its raw-material orientation, then the country cannot but reform its natural monopolies following the path of the rest of the world. It seems to be necessary both for the Russian economy and Russian consumers. If the results of transformation of the common the EU energy market are convincing enough to launch a similar process in Russia, or even force the necessary reforms, Russia will have to find words of gratitude for the EU, which today is often criticised for its energy policy.

### References

1. Braun, J. 2011, *EU Energy Policy under the Treaty of Lisbon Rules: Between a new policy and business as usual*, available at: [http://www.academia.edu/1376523/The\\_EU\\_2020\\_Energy\\_Initiative\\_The\\_post-Lisbon\\_pattern\\_of\\_change\\_in\\_EU\\_energy\\_policy](http://www.academia.edu/1376523/The_EU_2020_Energy_Initiative_The_post-Lisbon_pattern_of_change_in_EU_energy_policy) (accessed 17 January 2013).
2. Danwitz, T. 2006, Regulation and liberalization of the European electricity market — a German view, *Energy law journal*, Vol. 27:423, July 1, available at: [2006/http://www.felj.org/docs/423—450.pdf](http://www.felj.org/docs/423—450.pdf) (accessed 17 January 2013).

3. Geradin, D. 2006, Twenty years of liberalization of network industries in the European Union: Where do we go now? *Social Science Research Network*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=946796](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946796) (accessed 17 January 2013).

4. Stromback, J., Dromacque, C. and Yassin, M. 2011, *The potential of smart meter enabled programs to increase energy and system efficiency: a mass pilot comparison*, VaasaETT Global Energy Think Tank, available at: <http://www.esmig.eu/press/filestor/empower-demand-report.pdf> (accessed 17 January 2013).

5. Vasconcelos, J. 2009, Energy regulation in Europe: regulatory policies and politics of regulation, *European review of energy markets*, Vol. 3, no. 3, October. available at: [http://www-55.mech.kuleuven.be/european-review-of-energy-market/EREM\\_9-Comment\\_Jorge\\_Vasconcelos.pdf](http://www-55.mech.kuleuven.be/european-review-of-energy-market/EREM_9-Comment_Jorge_Vasconcelos.pdf) (accessed 17 January 2013).

6. *Antimonopol'naja politika: Evropejskaja Komissija podtverzhdaet provedenie proverok bez preduprezhdenija v kompanijah gazovogo sektora* [Competition policy: Commission confirms unannounced inspections in the natural gas sector companies], 2011, Delegation of the European Union to Russia, 28 September, available at: [http://eeas.europa.eu/delegations/russia/press\\_corner/all\\_news/news/2011/20110929\\_ru.htm](http://eeas.europa.eu/delegations/russia/press_corner/all_news/news/2011/20110929_ru.htm) (accessed 19 January 2013).

### *About the authors*

*Dr Alexei Ispolinov*, Associate Professor, acting head of the Department of International Law, Faculty of Law, Lomonosov Moscow State University, Russia.

E-mail: [ispolin@lexinvest.ru](mailto:ispolin@lexinvest.ru)

*Tatiana Dvenadtcatova*, PhD student, Department of International Law, Faculty of Law, Lomonosov Moscow State University, Russia.

E-mail: [12ovatania@mail.ru](mailto:12ovatania@mail.ru)